

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3 CIVIL ACTION NUMBER:

4 IN RE: VALSARTAN PRODUCTS
5 LIABILITY LITIGATION

19-md-02875

6 TELEPHONIC STATUS
7 CONFERENCE

8 Mitchell H. Cohen Building & U.S. Courthouse
9 4th & Cooper Streets
10 Camden, New Jersey 08101
11 October 27, 2022
12 Commencing at 10:00 a.m.

13 B E F O R E:

14 THE HONORABLE ROBERT B. KUGLER
15 UNITED STATES DISTRICT JUDGE
16 and
17 THOMAS I. VANASKIE (RET.)
18 SPECIAL MASTER

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1 (PROCEEDINGS held telephonically before The Honorable
2 ROBERT B. KUGLER and SPECIAL MASTER [!SPECIAL MASTER] at
3 10:00 a.m.)

4 SPECIAL MASTER VANASKIE: Hello.

5 RESPONSE: Good morning.

6 SPECIAL MASTER VANASKIE: We'll give it a couple more
7 minutes because people are still joining, but it is 10:00.

8 (Pause in proceedings.)

9 SPECIAL MASTER VANASKIE: Maybe we'll get started
10 now.

11 Do we have a court reporter?

12 COURT REPORTER: It's Ann Marie Mitchell, Your Honor.
13 Good morning.

14 SPECIAL MASTER VANASKIE: Hi, Ann Marie. Nice to
15 have you. I hope all is well.

16 I wanted to clarify at the outset what it is you want
17 me to address before we bring in Judge Kugler.

18 I know I have this TPP trial defendants motion to
19 compel discovery.

20 Also asserted in the brief is a request to set a
21 schedule with respect to damage expert reports, Daubert
22 motions, et cetera.

23 It seems to me that part of this motion that's before
24 me is for Judge Kugler.

25 Who's the spokesperson for the plaintiffs, and what

1 is your position?

2 MR. HONIK: Your Honor, good morning, this is Ruben
3 Honik.

4 Your Honor, we were advised of the defendants'
5 interest and proposed schedule, I think it was either the day
6 of or the day before we submitted these letters or agenda to
7 the Court.

8 And our position is that it's appropriate to arrive
9 at a schedule. And it's certainly been our understanding on
10 the plaintiffs' side that we would tackle that, as we have all
11 other scheduling matters, which is to say that we would meet
12 and confer, and to the extent the parties could agree upon a
13 schedule, we would jointly propose that to the Court.

14 And it is still our intention to do that, contrary to
15 what the submitted letter by the defendants to Your Honor for
16 today indicates. We'd like the opportunity to confer with
17 them. We think a schedule should be arrived at. If we can do
18 that, all the better. If we can't, we'll certainly submit it
19 to the Court. And I believe you're correct that that's a
20 matter for Judge Kugler.

21 So we have a deadline between, I suppose, now and the
22 next -- we have an audience with the Judge.

23 SPECIAL MASTER VANASKIE: All right. Who is the
24 spokesperson for the defense?

25 MR. OSTFELD: Your Honor, this is Greg Ostfeld. I'll

1 be the spokesperson for the defense on this issue.

2 Respectfully, Your Honor, we have raised this issue
3 at five separate meet and confers. We raised it on October
4 9th, October 12th, October 16th, October 18th and October
5 25th. And on each occasion we have asked plaintiffs to
6 identify their proposed schedule for damages expert deadlines.

7 And the first three times they demurred on that
8 requested. To the fourth time on October 18th, we were told
9 that their position was no deadlines should be set until
10 there's been a ruling on class certification, a position with
11 which we vigorously disagree because we feel the Court has
12 made clear that a TPP trial is on a separate track from class
13 certification. So we believed we were at an impasse.

14 We had previously discussed any number of ranges that
15 would be acceptable to the defendants, ranging from 30 to 60
16 days after the CMO 29 deadlines, when plaintiffs advised us
17 that their position was they were not willing to discuss
18 setting case management deadlines for damages experts until
19 there was a class certification ruling.

20 We said we planned to raise this in our brief with
21 the Court. They requested our schedule, our specific schedule
22 that we would propose, which we also provided, and invited
23 further meet and confer. And there still hasn't been a meet
24 and confer.

25 Our view is if their position is there should be no

1 deadlines until there's been a class certification ruling, we
2 are at an impasse, and this issue is ripe for determination.
3 And I would defer to Your Honor as to whether this is an issue
4 for Your Honor or for Judge Kugler.

5 If their position is no longer that this needs to
6 await a class certification ruling, we are happy to discuss
7 plaintiffs' schedule. But we feel that that position, if it's
8 going to be their position, represents an impasse and that
9 this issue is ripe for a judicial determination.

10 MR. HONIK: Your Honor, Ruben Honik.

11 May I address a couple of points?

12 SPECIAL MASTER VANASKIE: Yes, you may, Mr. Honik.

13 MR. HONIK: Your Honor, I can't tell you how strongly
14 I disagree with the characterization of our contact.

15 I can state to the Court on my oath that no
16 discussion with any of the co-leads has occurred regarding the
17 schedule, and we have never conveyed to Mr. Ostfeld or anyone
18 else from among the co-leads that we're unwilling to meet and
19 confer about a schedule. On the contrary, it's as I stated,
20 we think a schedule is appropriate.

21 Now, we do think that it may be premature to set it
22 on the timeline proposed by the defendants. And we do think
23 that whatever that timeline is should fall on the calendar at
24 a point time after the Court has weighed in on a certification
25 motion. We think there's ample time to do that.

1 If it turns out that Judge Kugler views it
2 differently, that's fine. But at the end of the day, inasmuch
3 as this is an important matter for Judge Kugler to consider
4 and determine and decide, we think there's ample time for the
5 co-leads to confer with Mr. Ostfeld and anyone else on the
6 defense executive committee between now and our next audience
7 with Judge Kugler to see if we can arrive at something
8 together. And if as in many times in the past we're unable
9 to, we'll present our respective positions, and the Judge will
10 weigh in on it. I don't think it's much more complicated than
11 that.

12 SPECIAL MASTER VANASKIE: Okay. Anything else,
13 Mr. Ostfeld?

14 MR. OSTFELD: Your Honor, I would only note the
15 co-leads were invited to each of these meet and confers, and
16 it was my understanding that MSPRC's counsel, who attended
17 each of the meet and confers, was in contact with the co-leads
18 on this issue.

19 It sounds like Mr. Honik's position is consistent
20 with what was conveyed to me by MSPRC's counsel, which is that
21 they believe this matter should be deferred until class
22 certification has been decided. It is our understanding that
23 Judge Kugler would like to have the TPP trial proceeding
24 expeditiously towards trial, and we feel awaiting a ruling on
25 class certification and any appeal from that ruling is not

1 consistent with that objective.

2 I'm at the Court's pleasure in terms of whether you
3 would like us to confer further on this issue. We feel
4 efficiency is best served by setting these deadlines.

5 SPECIAL MASTER VANASKIE: I agree, Mr. Ostfeld, that
6 it appears appropriate that deadlines should be set, but I
7 also am of the view that this is a trial management matter
8 that is for Judge Kugler. So I guess I'm punting on this
9 issue. Judge Kugler will determine whether he should set
10 deadlines now or to require you to further meet and confer.

11 But I do think it would be appropriate to set
12 deadlines. It's just a question of -- it's a trial management
13 order, and I think that should go to Judge Kugler; unless he
14 says to me, handle it, in which case I'd be happy to. And I'd
15 ask you to meet and confer one more time, and then we'll issue
16 an order if you can't agree on a schedule.

17 All right. Let's move then to the discovery motion
18 itself.

19 And I wanted to ask a question at the outset --

20 And Mr. Honik, will you be addressing this issue for
21 the plaintiffs?

22 MR. HONIK: Your Honor, I perhaps will be addressing
23 certain elements of it, and folks, colleagues from Rivero
24 Mestre will be addressing others.

25 SPECIAL MASTER VANASKIE: All right. The first

1 question I have is whether there is agreement that request 2,
2 labeled subsidiary reimbursement and rebate data, will be
3 answered, will be provided, the information will be provided?

4 MR. RIVERO: Your Honor, this is Andres Rivero from
5 Rivero Mestre. And Your Honor, there is no such agreement.
6 And I'm glad to address it.

7 SPECIAL MASTER VANASKIE: Let's address it. I think
8 what I understood from the papers -- and I definitely could be
9 wrong -- is that you offered to provide the documents under
10 that category as a compromise and then not have to provide the
11 documents under Category 3, CMS bids, and Category 4, internal
12 reporting.

13 Is my understanding correct?

14 MR. RIVERO: Judge, it's more -- it is correct. And
15 I don't want to -- by the way, we had very good discussions
16 with Mr. Ostfeld, and I want to respect, you know, the
17 settlement nature of those that attach. But we absolutely
18 were willing to make compromise in that direction.

19 And, Judge, I have a proposal to make in terms of the
20 comments I'm going to make but not wholesale.

21 SPECIAL MASTER VANASKIE: Okay.

22 MR. RIVERO: I think -- I'll explain it. But yes, in
23 other words, Judge, in the sense that we think there is some
24 basis for some production, yes, but not wholesale.

25 SPECIAL MASTER VANASKIE: All right. So let me turn

1 to plaintiffs then.

2 The defense agenda letter addressed this matter, this
3 motion. It sounded like -- sort of like, almost like a reply
4 brief.

5 Do you want to respond at all to what has been said
6 in the agenda letter?

7 MR. RIVERO: Judge, it would be part of my -- I'm
8 glad to address the entire -- if you mean the merits, yes, I'm
9 glad to address the merits, if I may.

10 SPECIAL MASTER VANASKIE: I wanted to ask you, do you
11 to take that opportunity now?

12 MR. RIVERO: I'm glad to, Judge.

13 So let me -- I think, Your Honor, indeed to get right
14 to the heart of it, there are two categories I think the
15 Court -- the Judge has -- you have understood, Your Honor,
16 that it's historical information, which is 1, and then
17 projections and estimates, which is 2, and 3, including bid
18 information and internal reporting.

19 SPECIAL MASTER VANASKIE: Right.

20 MR. RIVERO: So, Judge, first taking projections and
21 estimates. And of course the burden is on the opposing party
22 to show that there's -- I'm sorry, to show that there's a --
23 I'm sorry, to the propounding party to show that there's
24 relevance to what they're asking for. So talking about
25 projection and estimates, Your Honor, 2 and 3, they simply

1 don't make that initial showing.

2 What is it they actually say that 2 and 3 could do
3 for them, Judge? This is critical to understand why they
4 don't make the showing.

5 They spent something like 40 pages, including a reply
6 sent two days ago. And this is the closest they come to
7 explaining to you why an estimate or a projection would have
8 anything to do with their actual loss.

9 They say -- and this is page 12, Judge, of their --
10 of their initial brief, which was an even exchange.

11 They say that they want to learn, quote: Actual loss
12 relative to their -- meaning the assignors' -- expectations,
13 which is the crux of disputed requests 3 and 4.

14 So Judge, it's not because I'm saying it. It's not
15 my characterization. They're saying 3 and 4 are
16 specifically -- the crux of what they're asking for is they
17 want to know expectations information in relation to actual
18 loss.

19 Now, Judge, that's in and of itself -- in common
20 sense, it doesn't make sense, because what's at issue is
21 actual loss. All the case law that either side cites is the
22 damages category that we are seeking is actual damages, which
23 is an -- to say our actual losses.

24 So what they are saying is in 3 and 4, they want to
25 know our expectations in relation to what ends up being the

1 actual losses.

2 Now, let me very quickly take an example why this
3 makes no sense. And I'll go further why they don't make this
4 showing.

5 Judge, let's assume I make a household budget of
6 \$3,000 for car repairs.

7 And this happened to me, Judge. I go to Shop 1 and I
8 spend \$1,500 and they fix my bad alternator but in the process
9 they break my air conditioner. I paid \$1,500. I'm unhappy
10 with Shop 1.

11 I go to Shop 2. They charge me \$1,500 to fix the air
12 conditioner.

13 Now, if you were to take the defendants' logic, I
14 didn't suffer a loss because my expectation was \$3,000.

15 Judge, my expectation has nothing whatsoever to do.
16 Every lawyer on this call knows I'm out at least the \$1,500
17 that they caused the damage to the air conditioner. So what I
18 expected doesn't determine it. Damages, Judge -- and I've
19 been doing this for 36 years, and I know there are lawyers,
20 including Your Honor, who have been doing this longer -- are
21 the actual amount I spent versus the actual amount perhaps I
22 received and other things about actual historical information.
23 That's Category 1. What I expect has nothing to do with it.
24 And no economist will say so.

25 In fact, Judge, because I go back to whether they met

1 their burden to show that what they say is the purpose. The
2 crux is expectations in relation to actual loss.

3 Your Honor, they presented experts, Stiroh and Kosty.
4 Neither Stiroh nor Kosty says anything of the sort, because no
5 economist worth their salt would say such a thing. They
6 absolutely don't have it in their reports. The only thing we
7 have is counsel saying in the future they may so opine. But
8 we don't have it.

9 Now, number two, Judge, obviously our expert doesn't
10 say that. Our expert says that our actual loss is our actual
11 spend. And that's based on Judge Kugler's ruling in this case
12 that the amount that the -- that the drugs are economically
13 worthless at the point of sale by virtue of the dangerousness
14 caused by the contamination. I'm reading from page 20 at 28
15 of the Judge's order.

16 We don't have to debate whether we're right or wrong,
17 but my expert is saying that was actually spent, historical
18 information is the damage.

19 That, by the way, we've already provided to the
20 defendants. They've gotten our actual spend on valsartan and
21 they've gotten our spend on the cost of replacement, which is
22 a defense theory, Judge, which I don't take issue with it
23 being, you know, impossible economically. We don't agree
24 that's the way to measure it. But it's at least something
25 that one could explain.

1 Number three, Judge, they cite cases, but none of the
2 cases goes to this question at all. The case they cite, the
3 principal case is an Ohio case called *JLJ* that says nothing
4 more than something that I heard in law school, expectation
5 damages equals actual damages.

6 So that's -- that is it. That's what the law is,
7 Judge. The law doesn't help them.

8 So at the end of the day they're saying the crux of
9 what they want is what were our expectations in relation to
10 our actual loss. But there's nothing in logic or in their
11 experts or in our expert or in the case law that starts to
12 make a showing. All they do is this conclusion. We each get
13 expectations in relation to actual loss, but they never
14 explain how that has any bearing whatsoever.

15 As a gut check, Your Honor, I called my college
16 roommate, former chair of economics at Wesleyan University,
17 PhD from Harvard in economics, and I asked him, and he called
18 it economic nonsense.

19 Judge, there is no basis to establish the first
20 thing, which is relevance of expectations in relation to
21 actual loss data that they already have.

22 Now, Judge, turning briefly to 2. And this is really
23 the question you asked me. Historical information is a
24 different subject. And it's not economic nonsense. I'll
25 concede. It's not economic nonsense. There's a different

1 problem that we address. And both sides talk about ad
2 nauseam, which is it's aggregated data, Your Honor.

3 SPECIAL MASTER VANASKIE: Let me interrupt you just
4 for a minute here.

5 MR. RIVERO: Sure.

6 SPECIAL MASTER VANASKIE: Because I'd like to hear
7 from plaintiffs with respect the CMS bids and the internal
8 reporting before going back to the reimbursement and rebate
9 data.

10 Who is going to speak for defendants?

11 MR. OSTFELD: Thank you, Your Honor. This is Greg
12 Ostfeld. I'll be addressing that for the defendants.

13 SPECIAL MASTER VANASKIE: Okay, Mr. Ostfeld.

14 MR. OSTFELD: So, Your Honor, I think common sense is
15 a good place to start here.

16 The plaintiffs' theory of injury in this case is that
17 because a series of valsartan-containing drugs were found in
18 some instances many years after they were reimbursed by the
19 TPPs to contain previously unknown nitrosamines, that the TPPs
20 have somehow been retroactively injured by that on the basis
21 of purchases or reimbursements that they made many years prior
22 to the discovery of this problem and the withdrawal of the
23 product from the market.

24 So that is an unusual and in our view a non-logical
25 theory of injury, that a TPP has been injured as a result of a

1 purchase that it already made on behalf of its beneficiaries,
2 that it's not really disputed delivered the clinical benefit
3 that was intended, and they're not claiming caused specific
4 physical injury to their beneficiaries, but nonetheless,
5 they're claiming they have suffered an economic loss as a
6 result of that.

7 The basic problem that plaintiff has is every single
8 claim that they are asserting is subjected to an actual
9 damages or actual losses limitation, every one of their
10 claims, either statutory or common law. And we set forth the
11 citations on that at pages 11 and 12 of our brief.

12 So the challenge ahead of us is determining whether
13 in fact these TPPs, the MAO assignors on whose behalf MSPRC is
14 asserting claims, did in fact incur actual damages or actual
15 losses on purchases that they made many years ago, whether
16 their expectations were defeated with respect to those
17 purchases. And the way that we probe that is by determining
18 what those expectations were versus what the costs were that
19 they actually incurred.

20 And with due respect to college roommates, this is
21 not economic nonsense. This is basic economics. Our experts,
22 Dr. Stiroh and Mr. Kosty, specifically criticize plaintiffs'
23 expert, Dr. Conti, for failing to account for functions like
24 government expenditures, discounts and rebates.

25 Mr. Kosty said that determining the costs borne by

1 the MAO assignors requires a significant amount of information
2 and is highly complex.

3 Dr. Stiroh said you need information on the actual
4 expenditures and the actual losses.

5 So what we're trying to get to here, Your Honor, is
6 actual losses. And this kind of information we can only
7 obtain by determining what the MAOs expected to pay versus
8 what they actually paid. Did the withdrawal of these
9 valsartan-containing drugs cause them to incur some economic
10 loss or economic --

11 (Court reporter clarification.)

12 MR. OSTFELD: So Your Honor, the data that we are
13 seeking, both the CMS bid data and the internal reports,
14 contain lots of information on the MAO's expected versus
15 actual drug payments, which will be useful to assess whether
16 in fact this withdrawal caused actual damages.

17 For example, Your Honor, the CMS bids contain what's
18 called the Rx bid workbook, the prescription drug bid
19 workbook, which has seven worksheets with highly relevant
20 information on projected and actual prescription drug spend.
21 Worksheet 2 of that workbook, for example, has data on the
22 utilization and cost of covered drugs by type of script and
23 anticipated revenue.

24 So this isn't like the car repair analogy where
25 you're just making a projection and then comparing actual

1 spend against what was projected without looking at the
2 categories of how it was spent, you're looking at utilization
3 as well. So you've got projections, you've got utilization,
4 and you're able to assess from that information the complex
5 question of whether there was a utilization that was not in
6 line with expectations.

7 We believe what this will show is that the
8 utilization during the years prior to the discovery of the
9 nitrosamine issue was in line with expectations,
10 or if it was not, that that was not caused by any
11 nitrosamine-related issues.

12 The question we want to assess is whether as a result
13 of the withdrawal, there were additional prescription drug
14 costs that were incurred. Those would constitute actual
15 losses or actual injury to the MAOs. If it could be shown
16 that as a result of the withdrawal they incurred additional
17 prescription drug costs that they did not expect to incur on
18 utilization of drugs that they otherwise would not have spent
19 for, that's information that's helpful from an actual damages
20 and actual loss perspective.

21 We don't know whether or not that's going to show up
22 even for the year of the withdrawal. For prior years we
23 expect that these CMS bid workbooks and internal documents are
24 going to show us utilization and spend in line with
25 expectations, and expectation damages are the classic measure

1 of breach of warranty damages.

2 So for that reason, Your Honor, we think we have met
3 our threshold showing of relevance.

4 MR. RIVERO: Your Honor, may I respond very briefly?
5 Judge, I don't know if you can hear me.

6 SPECIAL MASTER VANASKIE: Yes. I'm sorry. I muted
7 mine.

8 MR. RIVERO: No problem.

9 SPECIAL MASTER VANASKIE: I wanted the court reporter
10 to be able to hear.

11 But yes. Go ahead, please.

12 MR. RIVERO: Yes, Judge. And by the way, in any
13 remark I make, I want to say that I have a lot of respect for
14 Mr. Ostfeld and have had very positive discussions with him.
15 So I mean no disrespect, but, Judge, he didn't answer your
16 question.

17 That answer conflates historical data and actual
18 losses all over the place with the question of what the
19 estimates have to do with them. And there's no -- and by the
20 way, the last part, legally, again, no offense, but if you
21 look at the two cases they cite, there's an Ohio -- two Ohio
22 cases. All those cases say about expectation damages is an
23 old term is that -- to clarify, the courts say, expectation
24 damages in a contract setting are actual damages. It's an
25 old -- it's just a statement of something that we all

1 understand.

2 I'm not saying anything unusual. And that's why
3 historical information is not an economic nonsense request.
4 But respectfully, he's waved his hands a lot, but he didn't
5 tell you why if the assignor made an estimate that they were
6 going to spend \$3,000 on -- by the way, these are
7 aggregated -- this is aggregated. They're not talking about
8 specific -- there's no specific projection of valsartan. But
9 they made it -- I'm just using the 3,000 for reasons that you
10 know from my example.

11 And somebody caused them -- they really would have
12 spent \$1,500 but somebody caused them a damage, to spend
13 \$3,000, that they weren't out anything. The two are
14 unrelated, and he hasn't explained in any way in economic
15 sense that they are.

16 Again, I'm sorry, not to belabor it, but all
17 calculation of damages is what I spent versus what I got back,
18 and then there are legal questions about whether I should have
19 had to spend it in the first place. But there are actual
20 spend, actual receipt numbers, which is Category 2, not
21 projections and estimates.

22 Your Honor, they just -- they simply fail under our
23 rules. The modern discovery rules, there's a proportionality
24 test. And the first test is does it have some bearing of
25 relevance. And this question of estimates and projections has

1 absolutely no bearing of relevance, and they just -- you don't
2 get to the second question. It simply shouldn't be, Judge.

3 Glad to address historical information if you want me
4 to.

5 MR. HONIK: Your Honor, this is Ruben Honik.

6 May I add a very brief bit of context for this?

7 Because I think there's something being lost here.

8 SPECIAL MASTER VANASKIE: Go ahead, Mr. Honik.

9 MR. HONIK: Very briefly, Judge. As I listened to
10 Mr. Ostfeld not only today but during the course of a number
11 of meetings on this very topic, it strikes me very powerfully
12 that this is simply a rehash of an argument that all the
13 defendants made at this point nearly two years ago, that the
14 insurance companies involved here and the consumers have no
15 injury. Right? Either because their expectations were met
16 with reality or the insurance company would have had to pay
17 for a substitute drug for any number of other reasons, all of
18 which were asserted in extensive briefing to Judge Kugler.

19 And what Mr. Ostfeld did today on the record is to
20 mischaracterize our claim. Our claim for warranty is not
21 based on the lookback that he's talking about. What the Judge
22 has ruled in this case as a matter of pleading -- and we
23 understand that we have to prove the elements of it -- is that
24 this injury was completed at point of sale. When the drugs
25 are handed to patients, consumers, at the point of sale, they,

1 as well as the insurance companies, have completed an economic
2 transaction. They've paid for this drug.

3 And what the theory of this case is and what our
4 damage experts have modeled and outlined, which we do in
5 innumerable pharmaceutical cases, there's nothing novel about
6 this, is to say that these drugs were illegal, should not have
7 been in the marketplace and therefore have zero value.

8 And the Court in its motion to dismiss ruling
9 embraced that, for better or worse. And Mr. Ostfeld is simply
10 trying to reargue that.

11 And I mention this, because it's important to
12 understand the theory under which this is proceeding on the
13 relevance question.

14 If the injury and damage is complete at the point of
15 sale, the only question really is what was paid and what was
16 reimbursed. Those are the historical numbers that Mr. Rivero
17 is referring to. And we have both provided and will
18 supplement historical data so that they understand what the
19 actual dollars are.

20 It is wholly irrelevant to understand what the
21 parties thought they may have to put out. And it's even more
22 attenuated, Judge, because the numbers here -- we've used the
23 word "in the aggregate" frequently, but let's break down what
24 that means.

25 That means that the expectation is for all drugs, all

1 medical devices, all hospital treatment. It's an all-in
2 number. And because I was the one that deposed their experts,
3 Stiroh and Kosty, I asked them specifically -- because they
4 were barking up this tree at the beginning -- I said, how are
5 you going to do it, what's the formula, what's the
6 methodology, if you're going to take this aggregated number
7 and tell us how much is associated with valsartan? And Judge,
8 they were unable to do that.

9 And so this is relevant, because if they confessed or
10 stated under oath that there was no method by which you could
11 take an aggregate number reflecting a bid or an expectation
12 or, for that matter, the actual aggregated number once paid or
13 exchanged and then extrapolate from that something specific
14 that is de minimis for valsartan, that should not be a basis
15 for them to have a fishing expedition now.

16 That's what this is. They're fishing for numbers to
17 conjure up a formula that their experts have already conceded
18 under oath cannot be done.

19 That's the essence of the relevance argument.

20 MR. OSTFELD: Your Honor, this is Greg Ostfeld.

21 May I be heard on these issues?

22 SPECIAL MASTER VANASKIE: You certainly may,
23 Mr. Ostfeld.

24 MR. OSTFELD: Thank you, Your Honor.

25 I like to begin with Mr. Honik's point regarding

1 Judge Kugler's ruling on the motion to dismiss.

2 I think it's important to understand, as Mr. Honik
3 acknowledged, that this was a ruling that was made at the
4 motion to dismiss stage. And as Judge Kugler put it, the TPP
5 plaintiffs had alleged sufficient injury and the lack of
6 functionality at the motion to dismiss stage.

7 All that means is that we are at issue on plaintiffs'
8 alleged worthlessness theory. They are allowed to try to
9 prove that theory, and we are allowed to attempt to refute it.
10 So the fact that we intend to challenge that theory I think
11 should not be surprising to anyone. And the idea that we
12 would want to take discovery to demonstrate and substantiate
13 our challenge to that theory also should not surprise anybody.

14 It is our intention to show not only that the
15 products were not worthless at the point of sale but also that
16 the TPP plaintiffs incurred no injury because they incurred no
17 economic losses or actual injury.

18 At most what Mr. Honik has described might be a
19 theory of injury on the consumer side that they did not
20 consume what they believed they were consuming. We disagree
21 with that theory.

22 But certainly on the TPP side the idea that a
23 third-party payor whose only role was to reimburse a drug that
24 was purchased suffered an injury where they incurred no
25 additional cost or injury is something that we are allowed to

1 vigorously challenge through our experts.

2 I also respectfully disagree with Mr. Honik's
3 description of the admissions he believes he got out of our
4 experts at deposition.

5 The plaintiffs have now had an opportunity to brief
6 the issue, and those quotes which Mr. Honik also described at
7 the last case management conference certainly did not emerge
8 in their papers. And in fact, we put in the relevant quotes
9 into our papers. And what Mr. Kosty said was not that it was
10 impossible to disaggregate but it requires a significant
11 amount of information and is complex. What Dr. Stiroh said is
12 that information is needed on the actual expenditure. So
13 these were indications that what is needed to perform the type
14 of exercise that Mr. Honik describes is more information.

15 I also respectfully -- as Mr. Rivero said, we had
16 many good conversations, we had many good meet and confers, we
17 didn't reach resolution. I respect him as well. I even
18 respect his roommate whose deposition I would like to take
19 based on the representations that have been placed on the
20 record today.

21 But I think the key point, Your Honor, is you have to
22 look at not just -- it's not just a matter of the projections.
23 It's not just a matter of the expectations. We're not seeking
24 that in the abstract. What these papers tell us by looking at
25 utilization and spend, in addition to expectations, is how the

1 actual spend tracked the expectations. That's the key
2 difference from his car repair analogy. We're not just
3 getting the budget at the beginning of the year of I expect to
4 spend \$3,000 on car repair and then calling that a lack of
5 injury. We then get to actually see how the money was
6 utilized and how the spend lined up with the budget.

7 So what we would get to see in the example of his
8 analogy is the repair that was made, the damage, the
9 additional repair that was made, in that instance comparing
10 the projection against the spend shows the injury. It's not
11 just zeroing out the balance at the end. It's looking to see
12 utilization. And that's why we think the CMS bids are
13 relevant and why the internal documents are relevant.

14 SPECIAL MASTER VANASKIE: Why would it be appropriate
15 to provide them for a -- for the past ten years, the time
16 frame of the request?

17 MR. OSTFELD: Your Honor, that is a fair question.
18 It is most important for the year of the withdrawal. We think
19 that year is clearly relevant.

20 To the extent that the plaintiffs -- the TPPs are
21 asserting that they suffered economic loss retroactively from
22 prior spend, the projections in the previous years would be
23 less relevant. For the years other than the year of the
24 withdrawal, we may not need the projection data, but the
25 actual utilization and actual spend data from the Rx

1 worksheets would still be relevant, because that still enables
2 us to assess their theory of actual injury.

3 SPECIAL MASTER VANASKIE: And by the year of
4 withdrawal you mean 2018?

5 MR. OSTFELD: For the NDMA drugs, yes, I believe
6 that's correct, Your Honor.

7 I apologize. I've always been bad at dates. I'm
8 sure somebody will pipe up if I've gotten the date wrong, but
9 I believe it is 2018.

10 SPECIAL MASTER VANASKIE: Okay. Go ahead.

11 Is that Mr. Honik or --

12 MR. RIVERO: No. It's Andres Rivero, Judge.

13 SPECIAL MASTER VANASKIE: Mr. Rivero.

14 MR. RIVERO: Your Honor, yeah, I didn't get to
15 address the historical information, and I don't know --

16 SPECIAL MASTER VANASKIE: I do want to get back to
17 that. I want to finish up on this.

18 MR. RIVERO: Okay. Yep.

19 SPECIAL MASTER VANASKIE: The other point that's been
20 raised -- I shouldn't say the other. But another point that
21 has been raised concerns the proprietary and confidential
22 nature of this information.

23 MR. RIVERO: Yes, Judge.

24 SPECIAL MASTER VANASKIE: It seems to me that can all
25 be covered by the existing protective orders.

1 Why wouldn't be the protective orders be sufficient?

2 MR. RIVERO: Your Honor, that's on the second prong
3 of this analysis as to both categories.

4 But again, there is simply no showing -- I don't know
5 what Mr. Ostfeld is saying when he says utilization. There's
6 absolutely no showing that a projection -- and I understand
7 what he's saying is that a report may have both historical
8 information and a projection. But we're saying as to the
9 historical information, let's have that discussion about what
10 that means. But the part of it that's an estimate has no
11 bearing on what you actually spent.

12 If the Court on any aspect of this were to find that
13 production should be made -- Judge, I understand what the
14 Court is saying. It's extraordinarily sensitive. In the
15 SummaCare situation we have the testimony of the affiant from
16 SummaCare who says they're in the most competitive
17 jurisdiction in the United States for these bids and that, in
18 fact, Judge, one of the defendants that we can identify, we
19 don't know how many, are direct competitors. So we would want
20 this applied in the most rigorous way.

21 But I understand what the Court is saying. If you
22 were to order any kind of production, there is an order. We'd
23 want -- we would want to discuss what the right protections
24 were, especially in relation to competitors; but just they
25 simply don't meet the first prong on projections and

1 estimates.

2 I'm glad to answer any questions on that or address
3 historical information.

4 SPECIAL MASTER VANASKIE: No. That's all the
5 questions I had thus far.

6 Let's go to the historical information.

7 MR. RIVERO: Your Honor, obviously I make a
8 distinction whereas they make no showing whatsoever that an
9 estimate could bear on the actual spend and what's actually
10 received back by the assignors. I understand that doesn't
11 apply. And I'm not making that argument on historical
12 information. It could apply.

13 Here's the problem that exists for their making the
14 showing, though, that what we have is relevant to their claim.
15 All -- and this again is in our affiant's declarations. And
16 this is simply a fact. We produced already the particularized
17 historical information on total valsartan spend, and we
18 produced historical information on what we spent on
19 replacements. That we already gave to the defendants. They
20 have that. So on the spend side as to this drug that's in
21 controversy, they have it.

22 What they now want on the spend side is they want --
23 what we have is the aggregate of all pharmaceutical spends.

24 Now, Judge, number one, again, I don't know why
25 that's relevant. We totally -- what we spent in total, I

1 don't know how it goes to our damage on this. But I can at
2 least see the possibility, perhaps in relation to the next
3 part of what they ask, which is what did we receive from
4 Medicare. And I'm not saying it's economic nonsense. That
5 would be -- that would be -- that would be wrong. There's a
6 way it could be.

7 The problem is, Judge, they don't make -- they don't
8 make any showing that they have anyone who would be able to
9 create an economic model to disaggregate -- I think they call
10 it tease out. I think they use that -- somebody uses that.
11 It might be -- I don't know if it's counsel or one of their
12 experts. To tease out in the aggregate what the assignors got
13 from Medicare and how it did or did not relate to valsartan.
14 For the aggregate information to be relevant, they have to
15 have a means to disaggregate.

16 Rena Conti, our expert, says that cannot be done.
17 Now, I understand that one of their experts say it can be
18 done. I get that. But they haven't presented somebody who
19 says that.

20 But more important, Judge, there is one case exactly
21 that they cite on the entire subject matter, and that's in
22 *Namenda* out of New York. And I think nobody has really looked
23 at what *Namenda* means.

24 *Namenda*, Your Honor, was a motion in limine by the
25 defense to strike the plaintiffs' expert who testifies on

1 actual loss. And that plaintiffs' expert says that there are
2 Medicare payments but that it is not possible to disaggregate
3 the Medicare payments, exactly what I'm telling the Court.
4 That's what the court reports in its decision in *Namenda*, if
5 you look at it.

6 The defense expert, a fellow named Grabowski, says
7 the plaintiffs' expert is wrong. There may be a way to tease
8 it out, and therefore, the expert opinion is -- the
9 plaintiffs' expert opinion is misguided and should be
10 excluded.

11 But Grabowski, the opinion doesn't say -- because
12 Grabowski doesn't do it. Grabowski doesn't give a model about
13 how you would be able to do it. He just says, it may be
14 possible to do it.

15 Here's the ultimate point, Judge, to get to the
16 common sense and practical concerns. I understand it's
17 possible. Grabowski says it's possible. Defense counsel say
18 it's possible. They haven't offered an actual example or
19 model that we could look at and say, okay, yeah, we understand
20 and we can negotiate into that.

21 Here is what I would suggest very specifically,
22 Judge, is -- and I would certainly -- this would be a -- the
23 nature of a compromise is there are different categories.
24 There's the regular Part D per capita, per head reimbursement.
25 I'm glad to talk with the Court about why that's not

1 disaggregated and why it can't be disaggregated, which is a
2 reimbursement per person for pharmaceuticals.

3 But Judge, I think they -- honestly, I believe
4 they'll never -- no expert is going to really be able to do
5 that. Or Conti says they can't do it. Judge, given them the
6 year of recall. Give them the year of recall. And if they
7 can come up -- if an expert can come back and use the year of
8 recall and put together a model and persuade you they can do
9 it, let them come back and say, we're entitled to more.

10 But, Judge, on -- I think to be fair, on both
11 catastrophic and low income, those are two categories, give
12 them two years, Judge, for the same purpose, because I
13 believe, and in fact the plaintiffs' expert in *Namenda* says
14 it. So it's not because I tell you; it's because -- he says,
15 there -- he says, well, there could be some possibility on
16 catastrophic, which is a kind of Medicare payment to these
17 assignors, and in the low income -- by the way, the
18 plaintiffs' expert in *Namenda* doesn't mention low income, but
19 I'm telling the Court and the defense we believe that somebody
20 might say and it might be the area where they could find
21 something and make some model. So I'm being as -- you know,
22 I'm trying to be as fair on this as possible.

23 Give them two years, Judge. If they can come back --
24 because Rena Conti says, and I think she is the leading pharma
25 medical economist in the country, that it can't be

1 disaggregated or teased out, there's no reason they should get
2 ten years. It doesn't make sense. But I think that that
3 would be a fair result on this, Judge.

4 So to just -- and part of it -- the reason I say one
5 to two years, it is extraordinarily sensitive. This is the
6 heart of our assignors' business. In the MAO business, the
7 entire thing is the bids. And it's the secret sauce of, you
8 know, their estimates about medical inflation, their estimates
9 about how much, you know, the change -- the actuarial change
10 and the age of their pool population. And they're all
11 competing on these extremely specific things. It's the
12 sources and methods.

13 So that's why I would say, Judge, it would be in my
14 view a fair way to split the baby to say, okay, take these
15 samples, test them, and if you can come back with something
16 and show the Court -- you know, obviously we're going to look
17 at it very carefully, Judge. So that's what I would suggest
18 to the Court.

19 But again, the real legal analysis, Your Honor -- I'm
20 sorry, I don't want to belabor it -- is they don't meet the
21 burden right now. They do not meet the burden that they have
22 a means to disaggregate that would actually make it work. So
23 frankly, in a technical -- technically, I think they're not
24 entitled to it.

25 But I did tell the Court that I had a non-wholesale

1 approach to this that I think is fair, that gives them a
2 chance to do what they're saying, which the expert, Grabowski,
3 for the defense in *Namenda* said was possible but didn't do.
4 And then we could know whether they're actually able to do it.
5 That would be --

6 Your Honor, may I have just one moment?

7 SPECIAL MASTER VANASKIE: Yes, you may.

8 MR. RIVERO: And not -- and Judge, I do not want to
9 abuse your time, but while I recognize --

10 I think somebody is speaking. I want to make sure
11 the court reporter can hear.

12 Judge, it's not economic nonsense to talk about
13 historical info. There is simply no logical defense for
14 projections and estimates in any way when we are talking about
15 what was actually spent, which we've already given them, the
16 actual spend on replacement costs, which we've already given
17 them for valsartan, and what I'm telling the Court where --
18 you know, we are prepared to accept an order to prepare -- to
19 present actual receipts in aggregate, that's all we have, on
20 recall year as to generalized Part D premiums and maybe two
21 years as to -- as to -- as to allow them to test a real
22 economic theory. It's economic nonsense to talk about what
23 was estimated beforehand as having anything to do with what
24 was actually paid or was actually received.

25 Thank you, Judge.

1 SPECIAL MASTER VANASKIE: Thank you.

2 MR. OSTFELD: Your Honor, this is Greg Ostfeld.

3 SPECIAL MASTER VANASKIE: Yes, Mr. Ostfeld.

4 MR. OSTFELD: I think there have been two rather
5 remarkable propositions that have just been put forward by
6 MSPRC's counsel.

7 One is a reversal of the burden of proof, the
8 suggestion that it is somehow defendants' obligation to
9 disprove damages rather than plaintiffs' burden to prove
10 damages.

11 And the second is that demonstrating how data would
12 be used at trial precedes the discoverability of that data at
13 the discovery stage.

14 And I respectfully disagree with both of those.

15 The starting point of this analysis is plaintiffs'
16 burden to prove damages and the limitation on every single one
17 of MSPRC's claims that they are limited to actual damages or
18 actual losses.

19 There are -- there's a very important implication to
20 that. Government payments, subsidies, reimbursements and
21 rebates are not actual damages. They must be subtracted from
22 damages or set off. As the *In re: Namenda* court found, it is
23 not even a close question. And it is our position that it is
24 plaintiffs' burden to disaggregate the data and to subtract or
25 set off the government payments. And to the extent that they

1 fail to do so, they are subject to criticism for failing to do
2 so.

3 And that is what is -- exactly what is at issue in *In*
4 *re: Namenda*, and I think Mr. Rivero's description of that
5 case demonstrates exactly why these data are relevant.

6 What we may very well end up with at the trial stage
7 are an expert from plaintiff who has not accounted at all for
8 government expenditures in their calculation of MSPRC's
9 damages and an expert for the defense who is criticizing
10 plaintiffs' expert for failing to account for, subtract and
11 set off damages and seeks to use the discovery materials to
12 demonstrate that those data existed and plaintiffs simply
13 failed to do it.

14 We don't necessarily have to undertake the exercise
15 that plaintiffs apparently plan not to undertake. We don't
16 have to go year by year, calculate the government expenditures
17 and subtract them. We just simply need to demonstrate that
18 there is a basis to criticize plaintiffs' expert to do that.

19 Now, we also may go through that year-by-year
20 exercise, but we certainly don't have to demonstrate how we're
21 going to do that, give them a preview of who our expert is and
22 what our expert's opinions are going to be at the liberal
23 discovery stage.

24 I think what we have demonstrated is these data are
25 relevant. The opportunity to look at government expenditures,

1 the opportunity to determine whether those can be
2 disaggregated, whether those can be subtracted from
3 plaintiffs' asserted damages calculation, is clearly relevant,
4 is directly relevant to what is at issue in this case. And I
5 haven't heard anything from plaintiffs to suggest that we
6 haven't met our burden on that or that *In re: Namenda* is
7 wrong in its demonstration that government payments should be
8 subtracted from actual damages.

9 So this simply becomes an issue of a complex
10 calculation, which is what our experts said, a calculation
11 that requires a lot of information and something that needs to
12 be evaluated closely by the damages experts for both sides in
13 order to determine how to subtract, how to set off this very
14 important, potentially -- as our expert, Mr. Kosty, said, it's
15 about -- it's -- approximately 75 percent of the total spend
16 on prescription drugs comes from the government. So we're
17 talking about a very important component of damages here.

18 And this is the classic reason why you take
19 discovery, why you have broad and liberal discovery at the
20 discovery phases, to enable the experts, the people who know
21 this space, the people who understand these data, to dig in,
22 to look at the aggregate data, to propose how it could be
23 disaggregated, and who criticize each other. This is what the
24 trier of fact is ultimately going to be asked to look at is
25 each expert's criticisms of the others and who wins. And

1 having the data is an important first step for our experts to
2 undertake that analysis.

3 SPECIAL MASTER VANASKIE: Why --

4 MR. RIVERO: Your Honor --

5 SPECIAL MASTER VANASKIE: Let me ask this question,
6 please. And I'll ask this of Mr. Ostfeld.

7 Why wouldn't it be satisfactory at this time to limit
8 the production of the subsidy, reimbursement and rebate data
9 to the year of withdrawal or a two-year period and have your
10 experts determine what they can do with that information and
11 make your case for requiring more?

12 MR. OSTFELD: Well, Your Honor, I have two points
13 that I would make on that.

14 The first is that they're not seeking damages just
15 for a two-year lookback period, that they are seeking damages
16 going back for -- I believe six, seven, eight, ten years,
17 whatever the relevant time period is. They are seeking
18 damages going back quite far in time. And it is inefficient
19 for our experts to evaluate data on a piecemeal basis.

20 The second point, Your Honor, is, I don't believe
21 we've heard any explanation from the plaintiffs as to why it
22 would be unduly burdensome for them to produce these data for
23 the relevant years. We've listed on pages 7 and 8 of our
24 brief the specific reports and the specific datasets that we
25 believe are responsive to request number 2.

1 These are pre-baked. These are things that exist in
2 a finished form. They're all accessible from the same
3 databases. They're all accessible from the same websites.
4 You know, it's not like retrieving -- retrieving eight years
5 or seven years or six years is significantly more burdensome
6 than retrieving one year or two years. Plaintiffs have
7 certainly made no showing on that basis.

8 So rather than have some form of iterative process
9 where we're going back and forth between discovery and
10 demonstration and discovery and demonstration and having to
11 preview our experts' opinions, which I also think is
12 prejudicial and unfair to the defense when plaintiffs are not
13 previewing their experts' opinions and where they're opposing
14 having a case management schedule as to damages experts, I
15 don't think they should get a peek at what our experts'
16 methodology is going to be.

17 They haven't demonstrated burden. They haven't
18 demonstrated that this is irrelevant. Produce the data. Let
19 our experts undertake their analysis. They'll see the results
20 at the same time that we do, at the same time the Court does,
21 and then we proceed the way we always proceed in a trial, to
22 have the trier of fact decide who's right.

23 MR. RIVERO: Judge, if I may, Andres Rivero.

24 Judge, I think -- I want to make sure it's really
25 clear what I'm saying.

1 We're at the discovery phase. They have to show the
2 relevance. The problem that they have right now, and
3 unfortunately nobody can do this, they need to show you now
4 that the aggregated data now would be relevant. All they're
5 saying is maybe. And in fact, I got to tell you, it's worse.
6 Because Mr. Ostfeld says -- says, you know, maybe I can do it.
7 But the problem he has is that his expert, Mr. Kosty,
8 testified -- I have it in my brief at page 4 in a footnote:
9 The payments provided from the federal government to plan
10 sponsors -- that's the assignments -- are independent of
11 spending on a specific drug. Judge, that's a quote.

12 Mr. Kosty also says -- that's on the Part D, Judge.
13 That's the premium, which I'm telling you should be limited to
14 a year. And honestly, they don't meet their burden, they
15 shouldn't get the year, Judge, technically based on the law
16 and based on what Mr. -- their own experts said.

17 On what's called the Medicare risk corridor, which is
18 the catastrophic, which I referred to, which I said to be
19 fair, because we think it's a little bit more possible on a
20 risk -- on the risk corridor/catastrophic or on the low income
21 that somebody might be able to do something.

22 Kosty doesn't think so. Their expert doesn't think
23 so. Let me quote him. Quote: Medicare risk corridor
24 payments are made in aggregate at the end of the benefit
25 period and are not directly attributable to specific products,

1 classes of products or individual claims.

2 Judge, that's not our expert. That's their expert.

3 The problem they have -- and I'll go back to *Namenda*
4 for a second because I don't know if he's crystal clear. They
5 have a very serious problem. Right now in discovery we're
6 telling them and their expert is saying, the receipts for
7 Medicare are aggregated. They are not traceable back to
8 valsartan. That's what Kosty says. I just read it to you.
9 How in the world can aggregate be relevant?

10 And here's what the proposal is, which I'm agreeing
11 is not economic nonsense. It could be possible. It's
12 conceivable. Some expert might come in and create a model.
13 But the problem is they don't show us anything. Their experts
14 don't talk about it. So it's a guess. It's a speculation.
15 They haven't shown that it would be -- that it can be done.

16 And the expert that the defense put forward in
17 *Namenda*, a Dr. Grabowski, but -- and I noticed that the
18 defense doesn't want to do any specifics. They don't want to
19 talk specifically about their cases. They don't want to talk
20 specifically about their experts. They don't want to talk
21 specifically about anything that's been produced to them.
22 They want to talk in generalities.

23 Grabowski in *Namenda*, the order appears to suggest
24 Grabowski got no discovery. All Grabowski does is criticize
25 the plaintiff. So discovery from the best I can tell in

1 Namenda was not permitted for exactly what they're asking
2 here.

3 So Judge, it's a speculation. They don't meet the
4 burden.

5 But I think I'm being very reasonable in proposing
6 let me them have a year and see if they can do what nobody has
7 yet done. So I feel like it's Star Trek, to go where no one
8 has gone before. Maybe they're going to be able to do it.
9 And then give them the two years on the other categories,
10 because, again, I'm being ultra fair. We do believe there
11 might be some more possibility there. Let them try.

12 If they meet their burden in the first place, it
13 doesn't solve my proportionality problem. My proportionality
14 problem, my -- the sensitivity, but I conceded to the Court
15 that there is a confidentiality in place.

16 This is the entire competitive advantage of each of
17 these MAOs. Judge, if this leaks in here, it does really
18 serious economic harm. And I'm -- frankly, I propose
19 attorneys' eyes only with their experts, because this is super
20 sensitive, but I do say since it's not economic nonsense, let
21 them have a sample to see if they can meet the relevance
22 burden.

23 It is their burden. I'm not burden shifting.
24 They're failing to meet their burden, and I'm making a
25 concession I don't think I have to, Judge. That's my

1 proposal.

2 MR. HONIK: Your Honor, Ruben Honik. There's another
3 very compelling reason not to grant this discovery, Judge, and
4 that's internal consistency.

5 The relevant case to look at is not *Namenda*. And
6 I'll tell you why in a moment for another reason. It's our
7 case.

8 Plaintiffs sought in this very litigation the
9 production of cost data from downstream defendants,
10 wholesalers and retailers within the first year of this
11 litigation. It was extensively briefed and argued to Judge
12 Schneider. The downstream defendants said that it's
13 aggregated data that you cannot segregate. They argued that
14 it is highly sensitive to their business modeling. And we
15 were denied an opportunity to get that aggregated data.

16 There is precedent in this case where this Court has
17 denied a requesting party the very kind of data that we're
18 talking about here. And to now, frankly, consider any
19 positive by producing this or at least producing it without
20 some real showing that experts can do anything with this
21 disaggregate -- or with this aggregate data I think would be
22 inconsistent, respectfully, with the prior ruling of this
23 Court.

24 And finally, let me just point out something that's
25 extremely important that we haven't talked about. The *Namenda*

1 case in New York that the defendants so strongly rely upon was
2 an antitrust case.

3 Why is that important to consider? That was a pay
4 for delivery generic case, meaning an antitrust violation for
5 the unlawful delay of a generic drug into the marketplace.

6 So what do economists have to do in that case to
7 arrive at damages? Well, they have to compare a but for world
8 where they're envisioning what the economic impact of generic
9 entry would have been had it occurred at an earlier point in
10 time.

11 In order to get at that, *Namenda* only stands for the
12 proposition that you have to look at a very different
13 landscape of what the economic factors were. In other words,
14 it's a temporal evaluation economically over a period of time.

15 That's not what this warranty case is. This warranty
16 case -- and no experts disagree. The defendants don't
17 disagree. Our experts don't disagree. This is a single
18 event, if you will, when the drug is sold and it's paid for.
19 This isn't a comparison temporally over time in a created but
20 for world.

21 The fact that *Namenda* was decided in the context of a
22 antitrust case is -- makes it wholly different. And for no
23 other reason than that Judge Schneider denied the very type of
24 discovery that defendants now seek from us, that at least as
25 confidential and proprietary to the insurers as they are to

1 the downstream defendants, I don't think the outcome should be
2 any different, Judge.

3 MR. OSTFELD: Your Honor, this is Greg Ostfeld. I
4 don't want to exhaust the Court's patience, but I've had two
5 counsel make opposing arguments, if I could just briefly be
6 heard.

7 SPECIAL MASTER VANASKIE: You certainly may.

8 And I want to ask you too, what about taking what I
9 would view as -- not a sampling of data but limited data and
10 then coming back if you can make the case for more of the
11 data.

12 Go ahead, you respond, because you're right, you had
13 two lawyers making arguments, and you've got -- certainly have
14 to have an opportunity to respond.

15 MR. OSTFELD: Thank you, Judge.

16 And we're seeking limited data. We're seeking 14
17 specific data reports and 14 specific datasets over a limited
18 period of time. And frankly, producing that over the full
19 period of time versus producing it over a year or two, you're
20 talking about essentially the same amount of effort. So it is
21 a limited amount of data, but it will enable our experts to
22 undertake a comprehensive analysis.

23 Now Mr. Rivero made a point about what Mr. Kosty said
24 at deposition regarding the fact that the data are reported
25 for Medicare in the aggregate. That is certainly true, but

1 Mr. Kosty never said that it was possible to disaggregate the
2 data. What he said in his report at paragraphs 83 and 85 is
3 that it requires a significant amount of information on the
4 subsidies paid by the government entities and it's highly
5 complex. That is why we need more data, not less.

6 I also respectfully continue to disagree with
7 Mr. Rivero that the burden is upon us to demonstrate to
8 plaintiffs how they are supposed to go about disaggregating
9 the data, subtracting the government expenditures or setting
10 off the government expenditures.

11 The law is clear government expenditures are not
12 injury. The burden is upon the plaintiffs to perform that.
13 It is sufficient for our experts to have the data they need to
14 criticize plaintiffs' experts. And that is exactly the
15 dynamic that came out in *Namenda*.

16 Also, I have to specifically respectfully disagree
17 with Mr. Rivero that the conclusion to be drawn from the
18 motion in limine ruling in *Namenda* is the discovery was
19 disallowed. There's nothing to suggest that Dr. Grabowski in
20 *Namenda* didn't have access to data and wasn't using the data
21 available to criticize the damages methodology. There's
22 simply nothing in the record to suggest that.

23 So what we're dealing with here, Your Honor, is a
24 forthcoming classic battle of the experts, where plaintiffs'
25 experts are going to be arguing that they cannot disaggregate

1 the government data and are going to be seeking the full
2 amount that was spent at the point of sale as their damages.

3 Our experts are going to be criticizing plaintiffs'
4 experts for failing to disaggregate the data, not over a one-
5 or two-year period but over the entire time period. Whether
6 or not our experts then make the next step and actually
7 calculate what should have been subtracted out, that's our
8 strategic decision to make. That's our tactical decision to
9 make. We should be allowed to make that decision in
10 conference with our experts, not get a discrete piece of data
11 and then have to make some kind of showing beyond our burden
12 of proof, which is not ours, it's plaintiffs' burden of proof.
13 We should not be required to do that. We should simply be
14 given the datasets and data to which we are entitled to enable
15 our experts to formulate their criticism of plaintiffs'
16 damages calculation.

17 Lastly, Your Honor, with respect to Mr. Honik's point
18 regarding *Namenda* being an antitrust case. It certainly is an
19 antitrust case, and that comes with some differences.

20 But on this issue, it is perfectly clear what
21 happened. The uniform antitrust statute at issue in *Namenda*
22 contains a statutory restriction to actual damages. We showed
23 on pages 11 and 12 of our brief that every claim presented by
24 MSPRC likewise has an actual damages restriction. The New
25 York consumer protection statutory claims in fact have

1 language that very closely parallels the statutory language in
2 *Namenda*.

3 So in all instances we are dealing with an actual
4 damages to actual damages comparator. And the important point
5 from the *Namenda* decision is that government expenditures,
6 reimbursements, et cetera, are not damages. They have to come
7 out. It's not even a close question.

8 If it's not even a close question for trial, it's
9 even less of a close question at the discovery stage.

10 MR. HONIK: Judge, you may be muted.

11 SPECIAL MASTER VANASKIE: Last question I think for
12 Mr. Ostfeld.

13 And that is, production of data on attorneys' eyes
14 only basis, what's your position?

15 MR. OSTFELD: Your Honor, I think that's captured by
16 the restricted confidential category in the existing
17 protective order.

18 If plaintiffs are making the argument that restricted
19 confidential is no longer sufficient protection -- and I would
20 note the defendants have produced some really, really
21 sensitive documents under the restricted confidential
22 category. If they think they need something even more for
23 this to protect their secret sauce, I certainly would be fine
24 entertaining that, as long as counsel get to look at it and
25 our experts get to look at it in accordance with the

1 restricted confidential category.

2 If there's some category of disclosure within that
3 section that goes beyond that that they want to talk about,
4 that's fine. We don't want -- we're not looking to expose
5 their secret sauce to the world. We're looking to show it to
6 our experts and to be able to confer amongst counsel on it.

7 And that's for the TPP defendants. We're not
8 suggesting that CVS or the other downstream defendants or
9 pharmacies need to be brought into this.

10 SPECIAL MASTER VANASKIE: All right. Thank you.

11 Anything else from the plaintiffs?

12 MR. RIVERO: No, Judge, not from me.

13 SPECIAL MASTER VANASKIE: All right. Well argued.
14 We'll try to get a decision out promptly on this. I'm sure
15 I'll get the transcript -- this argument has been very
16 helpful. I'm sure I'll get the transcript promptly and make a
17 decision.

18 Is there any other matter you need to cover with me
19 before we get Judge Kugler on the line?

20 (No response.)

21 SPECIAL MASTER VANASKIE: Hearing nothing, what I'm
22 going to do then is drop off the call.

23 Excuse me? Go ahead.

24 MR. HUNCHUCK: I was on mute myself, Your Honor.

25 This is Steven Hunchuck from Morgan Lewis & Bockius

1 on behalf of defendants.

2 I just -- if I may, just give a quick update on the
3 losartan/irbesartan plaintiff fact sheet.

4 SPECIAL MASTER VANASKIE: Okay. Thank you.

5 MR. HUNCHUCK: I'll be short, Your Honor, because
6 this really is just a status update for the Court.

7 But in light of the recent productions of core
8 discovery from both parties in part, the defendants have
9 reached out to plaintiffs and discussed proposed plaintiff
10 fact sheets related to those products. We sent them drafts
11 on -- to plaintiffs' counsel on Friday.

12 So while this issue isn't ripe for today, other than
13 to inform the Court that the parties have begun the conferral
14 process and defendants hope to present any disagreements at
15 the next biweekly conference call.

16 SPECIAL MASTER VANASKIE: Great. Anything else?

17 MS. LOCKARD: Judge Vanaskie, good morning, it's
18 Victoria Lockard.

19 SPECIAL MASTER VANASKIE: Yes.

20 MS. LOCKARD: Just briefly, the only other issue I
21 believe we had proposed that is appropriate for you is the
22 parties had jointly proposed a briefing schedule on the motion
23 to seal, which we included in our submission, for opening
24 briefs on December 2nd and response briefs on December 19th.

25 So we'd like to get the Court's endorsement of that,

1 if you're inclined, and proceed accordingly, or as otherwise
2 instructed.

3 SPECIAL MASTER VANASKIE: Ms. Lockard, I thought you
4 were interrupting to congratulate the Phillies on beating the
5 Braves during the playoffs, but --

6 MS. LOCKARD: Ooh. I didn't expect it from you,
7 Judge Vanaskie. I expected it from Judge Kugler, but okay.
8 We'll take --

9 SPECIAL MASTER VANASKIE: We're both Phillies fans.
10 Yeah. But we'll issue an order on that.

11 I just want to double check with Judge Kugler,
12 because, again, it was one of those motions, it wasn't clear
13 if that should be mine or I should let Judge Kugler handle it.
14 But I don't see that as a problem.

15 Anything else?

16 (No response.)

17 SPECIAL MASTER VANASKIE: All right. I'm going to
18 drop off the call, get Judge Kugler on the line and rejoin you
19 all.

20 Thank you all very much.

21 (Pause in proceedings.)

22 THE COURT: It's a great day to be a fan of the
23 Philadelphia Phillies and the Eagles.

24 Hey, Mr. Slater, I was really disappointed in your
25 Yankees. I don't know what happened, but I think their team

1 is better than that. But what are you going to do?

2 MR. SLATER: Judge, as a Yankee fan, I thought they
3 exceeded expectations.

4 THE COURT: No.

5 MR. SLATER: Don't you like a Yankee fan with a glass
6 half full attitude, though?

7 THE COURT: Well, they have some decisions to make
8 now, that's for sure. We'll see how they do.

9 But anyway --

10 MR. SLATER: But congratulations to the Phillies.

11 THE COURT: Huh?

12 MR. SLATER: I said, congratulations to the Phillies.

13 THE COURT: Thank you. They exceeded all my
14 expectations. Back in September, I didn't think they were
15 going to make it to the playoffs, bit boy, it sure has been
16 exciting to be a Phillies fan right now. Houston is a great
17 team, but, you know, hope springs eternal among Philadelphia
18 people, so we will see.

19 How about we get right to the dismissals.

20 Mr. Harkins, are you going to handle this?

21 MR. HARKINS: Yes, Your Honor. This is Steve Harkins
22 with Greenberg Traurig for the Teva defendants and Joint
23 Defense Group.

24 THE COURT: You wrote about Richard Allen Williams.

25 Is Mr. Pittman on the call for Mr. Williams?

1 MR. HARKINS: Your Honor, this is Mr. Harkins. I'm
2 not hearing anything from counsel for plaintiffs or the Court.
3 But I just want to confirm that I'm not missing somebody on
4 mute.

5 THE COURT: Mr. Harkins, this is Judge Kugler again.
6 I got disconnected. I guess I haven't paid my AT&T bill
7 lately, so --

8 Anyway, I started to ask if Mr. Pittman was on the
9 line for the plaintiff. Is he on the line?

10 Is anybody on the line for the plaintiff Richard
11 Allen Williams?

12 I don't know, Mr. Harkins. Have you heard back from
13 them since you got the letter?

14 MR. HARKINS: Your Honor, we have not. Other than
15 that submission, we have not seen anything from counsel. They
16 have not attended any of the meet and confers.

17 I also note that effectively the extension that was
18 requested has really been granted by plaintiffs' counsel.

19 I can confirm that as of right now there is still no
20 plaintiff fact sheet filed with regard to this case, so we
21 think it's appropriate to finalize dismissal at this time.

22 THE COURT: All right. I'm going to grant your
23 motion to dismiss. This has been going on for quite some
24 time, and I don't know what's going on, but the plaintiff
25 needs to make a decision, hasn't made a decision knowing what

1 the consequences were, so I'm going to grant the application
2 to dismiss that.

3 All right. You wrote that the King and Collins
4 matters have been resolved.

5 How about the other four?

6 MR. HARKINS: One update there, Your Honor.

7 The Elie Greene v. Aurobindo matter has also been
8 resolved, and that order to show cause can be withdrawn.

9 The defendants therefore are only requesting
10 dismissals in three matters, the Smith, Thompson and Bernhardt
11 cases, and defendants would move for dismissal of those three
12 actions at this time.

13 THE COURT: Okay. Benita King, Carrie Collins and
14 Elie Greene, that order to show cause will be dismissed.

15 Anybody want to speak on Jim Smith, Eric Thompson or
16 Estate of Bernhardt?

17 MR. RESNICK: Your Honor, good morning. This is
18 Steven Resnick from Parafinczuk Wolf on behalf of the Estate
19 of Charles Bernhardt. I'd like to address the issue if I may,
20 Judge.

21 THE COURT: Sure.

22 MR. RESNICK: So our firm was retained by
23 Mr. Bernhardt in 2019. He subsequently passed away in 2021.

24 The surviving spouse, Osha Bernhardt, she's in her
25 80s, and we've had some difficulty contacting her. We've made

1 a number of calls. We've sent several letters. We tried to
2 locate other family members without much success in terms of a
3 response.

4 We recently engaged a company called Peoplehunter.com
5 which specializes in locating individuals for attorneys. And
6 that outfit helped us locate one of the children, a daughter
7 name Vicki Brown.

8 As it turns out, Judge, Mrs. Bernhardt happened to be
9 staying with the daughter at the time. And we're now in touch
10 with Mrs. Bernhardt, and we have her cooperation.

11 She certainly understands her obligations. She's
12 completed a fact sheet which we literally received yesterday
13 and which we submitted yesterday. There may be a missing
14 authorization which we've resent to the plaintiff. But we're
15 now in communication with her, and we have a good method of
16 reaching her.

17 Given her age, she does need a bit more hand-holding,
18 but I think it would reasonable to allow her at least one more
19 opportunity to participate in this litigation.

20 So we would request an order to show cause be denied
21 or at a minimum that the returnable date on the rule to show
22 cause be extended at least to the next case management
23 conference.

24 THE COURT: All right. We'll extend it another 30
25 days to the next management conference to see how it works

1 out. Okay?

2 MR. RESNICK: Okay. Thank you, Your Honor.

3 THE COURT: All right. So the Jim Smith and Eric
4 Thompson matters will be dismissed since no one has spoken on
5 their behalf.

6 Mr. Harkins, you have -- let's see -- ten you want to
7 list for order to show cause.

8 Any changes on those?

9 MR. HARKINS: One update there, Your Honor.

10 Number 4 on our list, Gracie Ellis, that case can be
11 withdrawn, so we would request orders to show cause returnable
12 at the next case management conference in the other nine
13 matters.

14 THE COURT: Anybody want to speak on behalf of any of
15 these plaintiffs at this time?

16 MR. NIGH: Your Honor, it's Daniel Nigh on behalf of
17 Carl Mirabile. And I would just reiterate what we said in the
18 past, that we don't believe that billing records are a core
19 deficiency. However, as we've done in the past, we've been
20 able to usually work these out over the next 30 days so we
21 don't have an issue at the next case management conference.

22 THE COURT: Okay. You've got another 30 days to see
23 if we can get it worked out.

24 Anybody else?

25 MR. RESNICK: Your Honor, this is Steven Resnick

1 again from Parafinczuk Wolf. I can speak to Chikhi, Baker and
2 Engel.

3 We're still working to cure the deficiencies in those
4 cases and hope to be able to do so by the next case management
5 conference. Just wanted to let you know.

6 THE COURT: Okay. Thank you.

7 All right. Estate of Rita Chikhi, C-H-I-K-H-I;
8 Yvonne Baker; Carl Mirabile, M-I-R-A-B-I-L-E; Gracie Ellis;
9 Rose McCarty; Bobby Yount.

10 I'm sorry, Gracie Ellis, no. That's not going to be
11 listed.

12 Rose McCarty; Bobby Yount; Robert Parker; Howard
13 Engel; Genita, G-E-N-I-T-A, Johnson; and Anthony Long will all
14 be listed as an order to show cause why they shouldn't be
15 dismissed at the next management conference.

16 Then we have 20 more, Mr. Harkins, you want to list
17 again. Correct?

18 MR. HARKINS: Yes, Your Honor. No updates on the
19 remainder of that list, although turning just back briefly to
20 the prior request orders to show cause in the nine cases, I'll
21 just note, because this comment has been made several times
22 now on our recent most case management conference calls, the
23 specific issue of whether medical expenses were a core
24 deficiency was argued to Judge Schneider on the May 27, 2020
25 case management conference.

1 Judge Schneider ruled that the failure to provide
2 medical expenses or records documenting medical expenses was a
3 core deficiency, that being a deficiency that standing alone
4 was sufficient to justify placement on this list and a request
5 for an order to show cause leading to eventual dismissal.

6 We've been proceeding under that for more than two
7 years now, so we are going to continue to list these as a core
8 deficiency in accordance with Judge Schneider's ruling. If
9 the Court would like us to revisit that, we certainly can.

10 And again, I believe as Mr. Nigh has acknowledged,
11 this has not led to the actual dismissal of cases, but it has
12 been very helpful in enabling us to actually obtain these
13 records from plaintiffs.

14 So with that note, though, no other updates to the
15 requests for defendants to relist those 20 matters for the
16 next case management conference.

17 THE COURT: We are not going to revisit that ruling.
18 It has been efficient. Everybody understands it.

19 But I understand how Mr. Nigh makes the point he
20 makes, and that's okay. But we will continue to dismiss cases
21 if they fail to supply billing records.

22 All right. So we have Clifford Conley; Harold
23 Mabry -- I'm having some problems here today with the
24 internet -- Dennis Macabuhay, M-A-C-A-B-U-H-A-Y; Estate of
25 Daniel Kwoka, K-W-O-K-A; Estate of Eloise Allen; Carrie

1 Collins; Maritza Hernandez; Zola Owens; Willie Quarles,
2 Q-U-A-R-L-E-S; Larry Bass; Ina Roddey, R-O-D-D-E-Y; Estate of
3 Candace King; Robert Bailey; Thomas Amoia, A-M-O-I-A; Robert
4 Lewis; Brian Thompson; Renne, R-E-N-N-E, Bishop; Mona Clark;
5 Estate of Charlotte Orrino, O-R-R-I-N-O; and Estate of Gale,
6 G-A-L-E, Barber will all be listed next time for a second
7 listing.

8 Mr. Harkins, does that cover everything?

9 MR. HARKINS: That does. Thank you, Your Honor.

10 THE COURT: All right. I understand that you're
11 still trying to work out this timing for the motion to seal,
12 but apparently you've made a proposal. And if that's
13 agreeable to both sides, we'll enter that order.

14 The damages expert, I'm a little unclear as to where
15 you are in the timelines for that. I think there ought to be
16 timelines for the damages experts as requested by defendants.
17 If you can't work out the dates, I'll just impose them on you.

18 So do you want to -- plaintiffs and defendants want
19 to try to talk to each other about the dates for that and then
20 submit an order or proposal?

21 MR. HONIK: Yes, Your Honor. Ruben Honik for
22 plaintiffs.

23 We would like that opportunity.

24 THE COURT: Okay. Let's get that done within the
25 next seven days, please.

1 MR. HONIK: Yes, sir.

2 THE COURT: All right. Anything else?

3 (No response.)

4 THE COURT: Hearing nothing, thank you very much.

5 And Happy Halloween, everybody. We'll see you next month.

6 RESPONSE: Thank you, Your Honor.

7 (Proceedings concluded at 11:25 a.m.)

8 - - -

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11

12 /S/ Ann Marie Mitchell, CCR, CRR, RDR, RMR
13 Court Reporter/Transcriber

14 30th day of October, 2022
15 Date

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